Supreme Court, U. S.
FILED
FEB 10 1978
MICHAEL RODAK, JR., CLERK

in the

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1133

JOSEPH MARINO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, JOSEPH MARINO, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on November 10, 1977.

OPINION BELOW

The opinion (corrected) of the Court of Appeals, printed in Appendix A hereto, *infra,* (pp. A 1-11), is reported at 562 F.2d 941.

JURISDICTION

The judgment of the Court of Appeals was entered on November 10, 1977, Appendix A, *infra,* (A 12). A timely Petition for Rehearing was denied on December 12, 1977. Appendix B, *infra,* (p. A 14-15). The United States Court of Appeals for the Fifth Circuit granted Petitioner's motion to recall and stay its judgment and mandate on January 30, 1978. Appendix C, *infra,* (p. A 16). The time within which to file this Petition for Writ of Certiorari was extended by order of this Court dated January 17, 1978. Appendix D, *infra,* (p. A 18). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether this Court will review for the first time if it is plain error for the trial court to fail to instruct on all of the essential elements of a conspiracy to import marijuana into the United States from a place outside thereof, in violation of 21 U.S.C. 963 and 952(a) when the undisputed facts of record demonstrate that the trial court failed to instruct the jury that it must find beyond a reasonable doubt that the defendant had a "specific intent" to send or facilitate the sending of marijuana into the United States.

2. Whether this Court will review for the first time if it is plain error for the trial court to permeate its instructions to the jury, both before and after the case is submitted to it for its consideration, with repeated, unjustified and incorrect references to the use of "good common sense" in the place of the correct standards, especially when such impropriety is considered in tandem with an allusive comment to the effect that the Government had established its case.

3. Whether this Court will review for the first time if it is an abuse of the trial court's discretion to allow the Government to reopen its case allegedly for the sole purpose of establishing the situs of the overt acts alleged in the indictment but thereafter allow the Government to elicit contradictory

testimony of a substantive nature substantially exceeding anything to which that witness had testified during both direct and cross examination.

STATUTES INVOLVED

The Federal statutory provision involved, 21 U.S.C. §963 (and 952(a)) is set forth in Appendix E, *infra*, (pp. A 19).

STATEMENT OF THE FACTS

This is a prosecution under the statute familiarly known as a Controlled Substances Act, 21 U.S.C. §952(a) and particularly its "conspiracy and attempt" provisions under §963. Petitioner was indicted with five (5) others in a single count indictment but tried singularly for conspiring to import into the United States from a place outside thereof a controlled non-narcotic substance, marijuana. The trial was held in the United States District Court for the Southern District of Florida (Fulton, DJ). The Petitioner was found guilty and sentenced to a term of two years confinement followed by a special parole term for an equal period. The other defendants jointly indicted but tried previously received various periods of confinement and had prosecuted separate appeals on points and issues other than those raised below.

On the pertinent appeal, the United States Court of Appeals for the Fifth Circuit affirmed as to this defendant. The Court (Brown, C.J.; Clark, Hill, JJ.) concluded that the trial judge acted within his discretion in allowing the Government to reopen its case, that the insertion of remarks concerning the jury's use of "common sense" as a valuable tool in its deliberative process did not infect with plain error the otherwise adequate instructions, and the trial court's failure to instruct that the Government had to prove beyond a reasonable doubt that the Petitioner actually intended by his actions to further a conspiracy to import marijuana into the United States did not constitute plain error.

The indictment charged a single conspiracy from January 3, 1973, to March 8, 1973, to import marijuana

into the United States (from a place outside thereof) in violation of 21 U.S.C. §963. It further alleged the commission of three (3) overt acts by any one or more of the indicted conspirators. These included: (1) that on or about January 21, 1973, (co-defendant) Parks boarded a vessel called the Adventurer III at Watson's Island, Miami, Florida; (2) that on or about January 28, 1973, (co-defendant) Parks arrived at the pier behind the Adventurer III on Watson's Island; and (3) that on or about March 1, 1973, (co-defendant) Parks entered the Royal Castle at Biscayne Boulevard and Tenth Street in Miami, Florida (R. 144A).

In its attempt to prove a case against the Petitioner the Government called only two witnesses, Fred Williams, a crew member of the Adventurer III, and Michael Baumwald, an agent with the Bureau of Narcotics and Dangerous Drugs. Williams testified that the Captain of the Adventurer III was Roy Warren whom he accompanied to the North End of Miami in late January or early February, 1973, when Warren met and conversed with (co-defendant) Parks (Tr. 18, 19, 40). At this encounter Marino was merely present but did not participate (Tr. 41). Prior to this encounter, both Williams and Warren had been in communication with Federal agents (Tr. 40), and following the encounter, Williams and Warren reported its events to U.S. Customs (Tr. 23). The two reported that (co-defendant) Parks wanted them to take the Adventurer III to Montego Bay (Tr. 43).

Williams further testified that when he went to Montego Bay, Jamaica around February 10, 1973, he met with Parks, who arrived at the scene with the Petitioner (Tr. 25, 44). This meeting was the first occa-

sion at which the Petitioner spoke and his conversation consisted of the following: Warren asked the Petitioner when he could pick up the grass and the latter responded, "A few days" (Tr. 27); the Petitioner also stated, allegedly, that he would take Williams and Warren to "Maroontown" and there introduce them to Jamaicans who had marijuana (Tr. 44).

The next occasion at which Williams saw the Petitioner was on the Adventurer III off the Jamaican coast (Tr. 28), at which time the Petitioner allegedly said that they were to meet some fishermen who would lead them to the cove where the marijuana would be located. *Id.* According to Williams, the Petitioner stated to him that a dump truck would bring the "grass" to small boats (Tr. 29), which would, in turn, transport the marijuana to the Adventurer III, following which the vessel would proceed to the Bahamas (Tr. 28).

Following the completion of certain repairs to the Adventurer III, the Petitioner met with Williams and Warren at the Montego Bay Yacht Club in Jamaica and from there, in the company of others, they proceeded on board the Adventurer III to the location at which the small boat was to meet them and guide them to the appropriate cove (Tr. 31). The Petitioner reportedly advised the crew members how to find the small vessel which would act as their guide. *Id.*

Although the Petitioner participated in loading the marijuana on board the Adventurer III (Tr. 33), he did not leave with the vessel to its destination in the Bahamas, but, rather, returned to the United States the following day (Tr. 34). Ultimately the Adventurer III rendezvoused with a larger vessel on which (co-

defendant) Parks was waiting (Tr. 34, 35) and transferred the marijuana to it (Tr. 35). The larger vessel developed engine trouble, however, and the Adventurer III took it in tow for a short time, following which the Coast Guard, led by Agent Daumwald, approached and arrested everyone (Tr. 35, 36, 53) on March 8, 1973 (Tr. 53).

Following the foregoing testimony the Government and Petitioner stipulated that the cargo on board the vessel was marijuana (Tr. 55, 56), and the Government announced, "That was the Government's case" (Tr. 60) and rested (Tr. 61).

The Petitioner moved for a judgment of acquittal (Tr. 61), urging that the Government failed to prove both the alleged conspiracy between (co-defendant) Park and the Petitioner and that any one or more of the alleged overt acts had been committed (Tr. 62). Petitioner's trial counsel further argued that there was no proof whatsoever that the marijuana was destined for the United States (Tr. 63). During additional colloquy between defense and Government counsel on the one hand and both counsel and the Court on the other, Petitioner's counsel pointed out that, "there was no testimony whatsoever about any Watson's Island meeting" and "that Parks arrived at the pier behind the Adventurer III . . ." (Tr. 64, 65). This prompted Government counsel to request Court leave to reopen his case so that, ". . . I will . . . recall Mr. Williams and I can ask him if the Adventurer III was docked at Watson's Island" (Tr. 65). Court leave to do so was granted.

In soliciting testimony from its witness, Williams, during its "reopened" case, however, Government counsel greatly exceeded the perimeters for which leave to reopen had been granted and contradicted not only the allegations in the indictment, but the earlier testimony of its only witness on these points. The indictment alleged that Parks only visited the Adventurer III on two separate occasions, January 21st and January 28th (R. 144A). During direct examination Williams testified that he and Warren met Parks only in the North section of Miami, far from the downtown area (Tr. 65), where Watson's Island is located and the Adventurer III docked (Tr. 18). This same testimony by Williams was reaffirmed during his cross-examination (Tr. 40).

The Petitioner's trial counsel, in pointing out that there had been no testimony whatsoever respecting the overt acts alleged in the indictment said,

> "I would only like to state that overt act No. 1, which the Government is referring to, is on January 21 . . . Parks boarded the Adventurer III at Watson's Island and there is no testimony whatsoever about any Watson's Island meeting. This second overt act is that Parks arrived at the pier behind the Adventurer III on Watson's Island on January 28th, and there is no testimony to that." (Tr. 64, 65).

And these instructive arguments prompted the Government, during the reopening of its case, to lead its witness, Williams, into stating that the Adventurer III had been docked on "Watson's Island" (Tr. 67), and that (co-defendant) Parks and the Petitioner had had two meetings with him on board the vessel (Tr. 68).

At the conclusion of the evidentiary portion of the trial, the transcription of which did not exceed 65 pages, the trial court charged the jury. In doing so, the following pertinent portions are delineated below.

> FIRST, "Now, how do you determine *what is the truth* in the case: It is a simple process whereby you consider the testimony of the witnesses who testified before you and you consider those exhibits that have been received in evidence and then you *draw such inferences of fact as your good common sense tells you.* This testimony and these exhibits, that is, all of this evidence, supports and justifies" (Tr. 101).

> SECOND, "Now, if, after you have carefully considered all the evidence in the case in light of the law which I am now instructing you, *you have a full, firm and abiding conviction that this defendant is guilty* as charged in this indictment, *then his guilt has been proved* beyond a reasonable doubt, but if after you carefully consider the evidence in the case, you reach a conclusion that his guilt has not been established *in that way, that you do not have a full, firm and abiding conviction,* then, of course, it would be your duty to return a verdict of not guilty" (Tr. 103).

> THIRD, "Now, how do you judge the credibility of the testimony of a witness? I am going to give some guidelines to go by, but these guidelines that I give you are not all inclusive. *You may have some of your own equally valid and, if you do, use them"* (Tr. 104).

> *"I am going to tell you something now that is probably as important as anything else I will say to you:* In weighing the testimony of the witness and in judging this case and in determining what credit and weight will be given to the testimony, *each juror should use his or her good common sense.* When I use those words 'common sense' what I am talking about is *the experience and discretion and the judgment that you have gleaned over the period of your lifetime* in dealing with other people and matters of great importance to you" (Tr. 107, 108). * * * Was the testimony of the witness trustworthy or not, using those guidelines and most especially your common sense" (Tr. 108).

* * *

> "* * * consider all of the evidence that bears on each of these elements and the ultimate issue of the guilt or nonguilt of this defendant and all of these instructions I have given you *and, in the exercise of your good common sense, make a determination of whether the defendant is guilty or not guilty"* (Tr. 124).

> FOURTH, "* * * There may be a conviction even though the conspirators may not have succeeded in accomplishing their common purpose and, in fact, may have completely failed, as was the case here" (Tr. 121).

> FIFTH, [The supplemental, post-deliberative instruction in answer to the jury's question]: "Ladies and gentlemen of the jury, I

> think it would be improper for me to answer this question. Whether the defendant was cross-examined by counsel for the Government and, if so, what questions were to be put if solely within the discretion and judgment of the prosecutor, and so I respectfully decline to offer much more of an explanation than that, *except to say that your verdict, whichever way it is, should be based on the totality of the evidence in this case*" (Tr. 136).

Absent from the Court's instructions to the jury, however, is a charge on "specific intent" requiring the jury to determine the existence of evidence of record beyond a reasonable doubt that the defendant had a "specific intent" to send or facilitate the sending of marijuana into the United States, pursuant to the conspiracy charged as alleged in the indictment. See R. and Tr. — generally.

As indicated above, the Court of Appeals for the Fifth Circuit affirmed the conviction of the Petitioner, but in doing so, attempted to distinguish the instructions provided to the jury below from those determined to be plain error in *United States v. Martinez,* 496 F.2d 664 (5th Cir. 1974), *cert. denied* 419 U.S. 1051. It concluded that those instructions which were provided to the jury included that the jury must find beyond a reasonable doubt that the Petitioner had specific intent to commit the crime charged in the indictment; that there was no plain error in the trial court's permeating its instructions with the jury's use of its common sense, even where the concept of "its common sense" was termed "as important as anything else I will say to you" (Tr. 107-108); and that there was no abuse of discretion

in allowing the Government to reopen its case notwithstanding the excessive extreme to which the Government employed the opportunity to provide additional substantive evidence not previously included before "it rested its case."

REASONS FOR GRANTING THE WRIT

1. It is plain error for the trial court to fail to instruct on all of the essential elements of a conspiracy to import marijuana into the United States from a place outside thereof, in violation of 21 U.S.C. §963 and 952(a) when the undisputed facts of record demonstrate that the trial court failed to instruct the jury that it must find beyond a reasonable doubt that the defendant had a "specific intent" to send or facilitate the sending of marijuana into the United States.

The first question presented concerns a fundamental question as to the adequacy of instructions provided to the finders of fact in the prosecution of conspiracy, a specific intent offense, especially when the alleged object of the conspiracy is to import into the United States from a place outside thereof a non-narcotic substance. The question goes to the interpretation of those instructions which were provided to the finders of fact in comparison to the minimal standards required by law.

In *Ingram v. United States,* 360 U.S. 672, 678 (1959) this Court said:

> "A conspiracy to commit an offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself . . ."

establishing beyond peradventure that the intent which must be reasonably inferred before this Petitioner could

be found guilty is that the Petitioner specifically intended to conspire to import marijuana into the United States from a place outside thereof. Accordingly, the jurors should have been instructed that unless the Government presented evidence beyond a reasonable doubt that the defendant has the "specific intent" to send or facilitate the sending of marijuana into the United States, he must be acquitted. The foregoing standard is the law in several, if not all, of the Federal judicial circuits. Compare, *United States v. Zapata,* 497 F.2d 95 (5th Cir. 1974); *United States v. Pentapati,* 484 F.2d 450, 451, (5th Cir. 1973); *United States v. Christian,* 505 F.2d 94, 97 (5th Cir. 1974); and *Mason v. United States,* 383 F.2d 107, 110 (10th Cir. 1967).

Since the offense is conspiracy, even a conspiracy alleged under 21 U.S.C. §963 is a "specific intent" offense, *Ingram v. United States,* supra; *United States v. Prince,* 515 F.2d 564, 569 (5th Cir. 1975), the trial court's instruction failing to include the appropriate instruction on specific intent was plainly erroneous. *United States v. Bryant,* 461 F.2d 912 (6th Cir. 1972) and any decision from the Fifth Circuit holding to the contrary would conflict with *Bryant.*

But the decision of the Fifth Circuit of which the Petitioner now seeks review by this Court also conflicts with other decisions by that Court. In *United States v. Bosch,* 505 F.2d 78 (5th Cir. 1974) the same court determined that it was plainly erroneous for the trial court to fail to instruct on all essential elements of the offense charged even though defense counsel had participated in selecting or composing the particular instructions found to be plainly erroneous. See also *Merrill v. United States,* 338 F.2d 763 (5th Cir. 1964).

The only instructions given the jury regarding 21 U.S.C. §952, the substantive offense for which the Petitioner was charged with conspiring to violate, was a recital of that statute (Tr. 112). Thereafter, the trial court directed the jury's away from the elements of Section 952, contravening the requirements established by its earlier cases and that in the *Bryant* decision. In *Bryant*, the Court observed that the defendant while undisputedly driving the vehicle in which the principal was transported did not necessarily thereby facilitate the performance of an act prohibited by law. In like fashion, the Petitioner could easily have loaded marijuana on a vessel with impunity from American jurisdiction and prosecution, so long as he did not intend that the cargo be imported into the United States. By not even instructing the jury that it must find beyond a reasonable doubt that the Petitioner had specific knowledge of the destiny of the marijuana he helped procure or load, it left the jury with the impression that so long as he intended to load the cargo on the vessel, irrespective of its destiny, he could be found guilty of conspiracy under §963, Code, *supra*. Such an interpretation contravenes authorities *op. cit.* and logic.

Indeed, in *Mason v. United States, supra,* at 110, the Court said:

> "The foregoing cases established that specific knowledge of illegal importation by one defendant cannot be imputed to the other defendants, though direct or circumstantial evidence may justify an inference that a particular defendant had knowledge of illegal importation. The charge in the case at bar as to actual knowledge also fails to instruct that the evidence must show that each defendant had specific knowledge . . . ."

Highlighted by the fact that the evidence of record did not establish with clarity that the Petitioner had any knowledge of the ultimate destination of the marijuana, since the prosecution's witness merely testified that he had had *a* conversation without clarifying with whom wherein it had been mentioned that the "grass" was going "towards West Palm Beach," the trial court's omitting any instruction as to actual knowledge and the "specific intent" required by the authorities *op. cit.* was plainly erroneous, inherently prejudicing the Petitioner. Had the jury's attention been focused on this aspect of the proofs, under appropriate judicial guidelines advising that they were required to determine if the Government had proven that the Petitioner knew where the marijuana was going, even to the point where it was "being imported (anywhere) in the United States," they could reasonably have found that the Government had not proven this element beyond a reasonable doubt. Without such instruction, however, the jury interpreted the meager facts of record under improper guidelines and inherently drew incorrect and unfounded inferences.

Moreover, the holding of the Court below directly conflicts with an earlier decision by a different panel of the same Circuit Court in *United States v. Martinez, supra.* Therein, the Fifth Circuit considered as one "seriour error" the ". . . failure of the trial court to instruct the jury on the elements of the substantive crimes constituting the objects of the charged conspiracy, i.e., (1) to import marijuana . . . ," saying:

> "There is nothing in the charge to the jury which apprised them of the *definition, character* or nature of the *acts of importing* . . . ." (Emphasis added)

And the lower court's attempt to distinguish the facts at bar from those determined to exist in *United States v. Martinez, supra,* is an over attenuation, distinguishing the undistinguishable and elevating form over substance to the Petitioner's terrible detriment. In a period when thoughtful people are seriously concerned about the fundamental fairness and the machinery of our society taking sufficient time with each case to dispose of a claimant's ultimate fate with the most educated of decisions, the events and rulings of which review is herein sought certainly warrant the attention of this Court.

2. It is plain error for the trial court to permeate its instructions to the jury, both before and after the case is submitted to it for its consideration, with repeated, unjustified and incorrect references to the use of "good common sense" in the place of the correct standards, especially when such impropriety is considered in tandem with an allusive comment to the effect that the Government had established its case.

The Petitioner pleaded not guilty to the subject trial, thereby placing in issue every material allegation in the indictment. *Roe v. United States,* 287 F.2d 435, 440 (5th Cir. 1961), *cert. denied* 368 U.S. 814. This not only required the Government to present proof beyond a reasonable doubt on each and every element of the con-

spiracy charged, but also allowed him to stand on his "presumption of innocence" as an inherent aspect of his defense. The trial court's instructions to the jury, however, as outlined in the Statement of Facts, *supra,* negated that presumption and blatantly urged the jury to use its "good ole common sense" in weighing the "testimony of *the* witness" (Tr. 107, 108) in judging the guilt or non-guilt of the petitioner.

This second question presented, therefore, concerns a fundamental question of the degree to which this Court will allow a trial court to permit the jury to use its "common sense" and its own background in determining the credibility of witnesses and that which it considers to be the truth, as against legal standards long prescribed by the various Circuit Courts of Appeal. It is a question of first impression in this Court.

The unusual development prompted by the trial court's digressions began when it rhetorically asked the jury how it was to determine "the truth in the case" (Tr. 101), before answering the very question by referring to the jury (1) their common sense and (2) and examine that to which the witness (Tr. 107) had testified as well as the exhibits which were introduced. The *in tandem* effect of the limited consideration of the case and the employment of "good ole common sense," irretrievably and irrevocably funneled the attention of the jury to return a guilty verdict since the defendant presented no witnesses other than himself against the Government's evidence. Essentially this practice has been repeatedly condemned, *United States v. Lowrey,* 456 F.2d 341, 346, 347 (5th Cir. 1972); *United States v. Garza,* 426 F.2d 949, 954-955 (5th Cir. 1970); *United States v. Womack,* 454 F.2d 1337 (5th Cir. 1972), but not adhered to by the

Court of Appeals below which, in effect, approved the trial court's focusing the attention of the jury solely on the Government's evidence, a practice condemned in *United States v. Hayward*, 420 F.2d 142, 144-145 (D.C. Cir. 1969).

Moreover, the trial court's efforts to define reasonable doubt (Tr. 103) created two standards, reasonable doubt versus common sense, and the employment by the trial court of the second instruction set forth in the Statement of Facts, *supra* has been specifically disapproved by the First Circuit in *United States v. Flannery*, 452 F.2d 880, 882-883, (1st Cir. 1971), in essence creating a conflict between that approved in the decision now sought to be reviewed and that established in *Flannery*. In *Flannery*, the condemned charge included:

> "* * * We believe that in charging a jury, with respect to a reasonable doubt, that 'a reasonable doubt can be defined as a strong and abiding conviction that still remains after careful consideration of all the evidence,' the Court must have misspoken itself. A reasonable doubt . . . *does not require*, as charged by the court, a *'strong and abiding conviction.'* This is the burden that is on the Government. * * *" (Emphasis added).

These conflicting instructions on reasonable doubt, especially when the latter of the two is the incorrect instruction, simply cannot be condoned by this Court. The Court of Appeals' condoning it in substance contravenes the rule established in the Ninth Circuit in *Notaro v. United States*, 363 F.2d 169, 173 (9th Cir. 1966).

The prosecution's evidence in this case is composed of a motley collection of bits and pieces of the remarks of a single witness which, even through the most attenuated series of inference building, left substantial deficiencies in the prosection's case vis-a-vis the petitioner's actual knowledge that the ultimate destiny of the marijuana was to be within the jurisdictional limits of the United States and his specifically intending that the marijuana be imported into the United States. The confused and conflicting instructions, as delineated and discussed *supra*, as well as the trial court's propensity to allow the jury to substitute its "gut reaction" for concise judicial guidelines within which the slim factual setting was to be considered hazed the intellectual processes by which the jury reached its verdict, irretrievably tainting that process so as to require reversal. The patchwork of facts unsuccessfully assembled is too threadbare to contain this Petitioner and presents a question of basic fairness in Federal criminal process that is deserving of review by this Court.

3. It is an abuse of the trial court's discretion to allow the Government to reopen its case allegedly for the sole purpose of establishing the situs of the overt acts alleged in the indictment but thereafter allow the Government to elicit contradictory testimony of a substantive nature substantially exceeding anything to which that witness had testified during both direct and cross examination.

The third question presented concerns a fundamental question of the scope of a trial court's judicial discretion in allowing the prosecution to reopen its case after

having the benefit of a defendant's revelation and analysis of its omissions, especially when the Government employs the opportunity through the reopened case to introduce substantial evidence hitherto omitted and without which a defendant would be entitled to a judgment of acquittal. This, too, is a question of first impression with this Court.

Where the Government inadvertently omits noncontroverted matter essential to a complete record, the Courts of Appeal have allowed the trial courts wide discretion in permitting the reopening of the case-in-chief to fill the omission and thereby complete the record. *Dixon v. United States,* 333 F.2d 348 (5th Cir. 1964); *United States v. Suarez,* 487 F.2d 236, 237 (5th Cir. 1973); *Hale v. United States,* 410 F.2d 147 (5th Cir. 1969), *cert. denied* 396 U.S. 902. The same "inadvertent omission" standard exists in other Circuits. *Morgan v. United States,* 294 F.2d 911, 912 (D.C. Cir. 1961); *United States v. Williams,* 336 F.2d 183, 184 (2nd cir. 1964); *United States v. Woodring,* 444 F.2d 749 (9th Cir. 1971). But a different standard exists in the Eighth Circuit, *United States v. Moehring,* 446 F.2d 516 (8th Cir. 1971); *United States v. Webb,* 533 F.2d 391 (8th Cir. 1976), which evaluates the evidence introduced during a "reopened case" by whether a defendant was "surprised" by the testimony or might have required further preparation to meet it.

In *Moehring,* supra, the Government forgot to introduce into evidence the identification number of the stolen motor vehicle in a Dyer Act case. In *Webb,* supra, the Government overlooked proving that the short-barrelled shotgun with whose illegal possession the defendant was charged was serviceable. Employing the

following standard, the Eighth Circuit concluded that the defendant suffered no prejudice:

> "* * * Relevant factors for decision are whether the evidence caused surprise to the defendant, whether he was given adequate opportunity to meet the proof and whether the evidence was more detrimental to him because of the order in which it was introduced. * * *" *United States v. Webb, supra,* at 395.

The Court of Appeals, below, however, condoned a total and complete failure to prove any of the overt acts charged in the indictment and the use of contradictory testimony from the Government's single witness on the subject matter (Williams) while the Government's exceeded the limited basis for which reopening was permitted by the trial court to establish the situs of a single meeting — to include in the record testimony new, substantial substantive matters on which there had been a prior void:

> "By Mr. Pave:
>
> Q. Mr. Williams, you testified earlier that [1] you met Mr. Marino in company with Mr. Parks and [2] you testified that it was aboard the vessel Adventurer III, is that correct:
>
> A. Yes, sir." (Tr. 67).
>
> "Q. [By the Government] How many meetings did you have with Mr. Parks and Mr. Marino aboard that vessel, sir?

A. At least two." (Tr. 68)

The effect of the foregoing was obvious: Instead of permitting reopening of the Government's case to cure an inadvertently omitted uncontested fact such as the situs of an established meeting, the trial court authorized, and the Court of Appeals condoned, the reopening of the prosecution's case so as to allow its sole witness on the pertinent matters to change his entire testimony and, in the process, create a more substantial impression that the petitioner loomed more criminally in the background. The foregoing substantially deviated from the Court of Appeals standard and from that employed by the Eighth Circuit.

In its order, the Court of Appeals below, characterized the evidence introduced by the prosecution during its reopened case as that having to do, ". . . with an uncontested fact — the exact situs of the meeting between Parks and Williams." Such flippancy and the trivializing of the standard previously used in the Fifth Circuit or that employed in the Eighth Circuit cannot be tolerated, especially in a period such as this when thoughtful people are seriously concerned about the objectivity and fairness of the Federal criminal justice system. Accordingly, singularly or *in tandem*, the events occurring in the Petitioner's trial, and the rulings by the Court of Appeals below, certainly warrant the attention of this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that a Writ of Certiorari should be granted by this Court.

Respectfully submitted,

GEORGE D. GOLD, ESQ.
MORAN & GOLD, P.A.
etc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the within Petition of Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed this 10th day of February, 1978, to the Solicitor General, Department of Justice, Washington, D.C. 20530.

George D. Gold

Appendix

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Joseph MARINO,
Defendant-Appellant.

No. 76-4400

Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Nov. 10, 1977.

Defendant was convicted before the United States District Court for the Southern District of Florida at West Palm Beach, Charles B. Fulton, J., of conspiracy to import marijuana, and he appealed. The Court of Appeals, Brown, Chief Judge, held that: (1) trial judge acted within his discretion in allowing Government to reopen its case; (2) mere insertion of remarks about jury's use of common sense as valuable tool in deliberative process did not infect otherwise adequate instructions with plain error, and (3) failure to instruct that Government had to prove beyond a reasonable doubt that defendant actually intended by his actions to further conspiracy did not constitute plain error.

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*Rule 13, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al., 5 Cir. 1970, 431 F.2d 409, Part I.

Affirmed.

1. Criminal Law —423(1)

Once government has satisfactorily established existence of conspiracy, same evidence used to convict a particular defendant is admissible against all codefendants proved to be members of conspiracy.

2. Criminal Law —686(1)

Trial court has discretion to allow Government to reopen its case when Government's request is predicated upon its inadvertent failure to have adduced or proved some more or less uncontested fact or facet of its case unless defendant can show prejudice; considerable latitude and discretion is vested in the trial court in such matters.

3. Criminal Law —686(1)

Where defense had not begun its case when motion was made and, furthermore, omission of proof was, without a doubt, inadvertent and had to do with an uncontested fact, the exact situs of meeting between defendant and crew member of ship on which marijuana was allegedly to be smuggled, trial judge acted within his discretion in allowing Government to reopen its case.

4. Criminal Law —1038.1(2)

Allegations of error in connection with instructions to which defendant did not object had to be viewed under a plain error standard.

5. Criminal Law —1038.1(3)

Mere insertion of remarks about use of common sense by jurors, who were not to be presumed ignorant of what everybody else knows but could act upon matters within their general knowledge without any testimony on such matters, as valuable tool in the deliberative process did not infect instructions, which were otherwise adequate, with plain error.

6. Criminal Law —1038.2

Where instructions adequately charged jury as to definition, character, and nature of acts of importing marijuana into the United States, including necessity that jury find beyond reasonable doubt that defendant had specific intent to commit charged crime, and there was sufficient evidence from which jury could have inferred beyond reasonable doubt that defendant knew destination of marijuana, failure to charge that Government had to prove beyond a reasonable doubt that defendant actually intended by his actions to further conspiracy did not constitute plain error. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§1002(a), 1013, 21 U.S.C.A. §§952(a), 963.

Appeal from the United States District Court for the Southern District of Florida.

Before BROWN, Chief Judge, and CLARK and HILL, Circuit Judges.

BROWN, Chief Judge:

Appellant was convicted on a one count indictment charging him with conspiracy to import marijuana in violation of 21 U.S.C.A. §§952(a) and 963. He argues that the trial court erred in allowing the government to reopen its case-in-chief and that the trial court's instructions to the jury were erroneous. We disagree and affirm.

Appellant was one of a group of several allegedly involved in a conspiracy to import marijuana from Jamaica into the United States. Government agents and the owner of M/V ADVENTURER III on which the marijuana was to be smuggled worked together to set up the arrest of the coconspirators, which took place on March 8, 1973, off the coast of Jamaica. Except for appellant, all of the coconspirators were present and arrested at this time. They entered a plea of nolo contendere and were sentenced to prison for various terms. Appellant was not arrested until approximately three years later.

[1] The government alleged in the indictment three overt acts in furtherance of the conspiracy, all of which were perpetrated by one of appellant's coconspirators.[1] They were that (i) on or about January 21, 1973, William Michael Parks boarded the vessel ADVENTURER III at Watson's Island, Miami, Florida; (ii) on or about January 28, 1973, William Michael Parks arrived at the pier behind the vessel ADVENTURER III on Watson's Island, Miami, Florida; and (iii) on or

[1]Of course, once the government has satisfactorily established the existence of the conspiracy, the same evidence used to convict a particular defendant is admissible against all co-defendants proved to be members of the conspiracy. See, e.g., United States v. Morrow, 5 Cir., 1976, 537 F.2d 120, 136 n. 17 and cases cited therein.

about March 1, 1973, William Michael Parks entered the Royal Castle at Biscayne Boulevard and Tenth Street, Miami, Florida.

The government called two witnesses to prove a conspiracy to import marijuana into the United States. The first was Fred Williams, a crew member aboard ADVENTURER III. Williams and the captain of the ship met during the early part of 1973 with appellant and Parks. Parks solicited the captain to take the ship to Jamaica for the purpose of picking up a load of marijuana.

There was a second meeting aboard the ship between Williams and appellant. During this meeting, Marino told Williams and the captain the initial details of the smuggling operation. At the third meeting, the appellant, the captain and Williams met on board the ship and proceeded to Negril, Jamaica, where they actually commenced the smuggling operations. Appellant then completed the instructions on how smuggling operations were to proceed. Marino departed, the marijuana was transferred to another ship, and all the coconspirators other than Marino were arrested.

The government's second witness was an agent of the Bureau of Narcotics and Dangerous Drugs. He testified about his surveillance of Parks and appellant.

The government then rested and defendant moved for judgment of acquittal, asserting that none of the overt acts alleged in the indictment had been proved and that there was no proof that the marijuana was destined for the United States. The government responded that it had proved the first overt act of the in-

dictment — the Watson's Island meeting in Miami. Defense counsel argued that there was no testimony as to any meeting occurring on Watson's Island. Upon motion, the Court then permitted the government to reopen its case to ask Williams where the meeting aboard the ADVENTURER III took place. Williams then testified that the ADVENTURER III was docked in Miami at Watson's Island.[2] In addition to this

[2]On recall, Williams testified as follows:

Q. Mr. Williams, you testified earlier that you met Mr. Marino in company with Mr. Parks and you testified that it was aboard the vessel ADVENTURER III; is that correct?

A. Yes, sir.

Q. Sir, where does the ADVENTURER III dock?

A. At Watson's Island.

Q. And where is that located, sir?

A. Just over here on the bay (indicating).

Q. You are indicating in Miami, Florida?

A. Yes, sir, right.

Q. How many meetings did you have with Mr. Parks and Mr. Marino aboard that vessel, sir?

A. At least two.

* * * * * *

THE COURT: When did you have those meetings?

THE WITNESS: The first part of '73.

meeting, there had been two meetings with Parks and appellant aboard the ADVENTURER III. The government then rested its case.

The defense then called its only witness, the appellant, whose testimony comprises a total of two pages. Tr. 70-71. Appellant stated that he had never testified in a court before, had resided in Hallandale, Florida for six years and in Illinois prior thereto, had not finished high school, and had never been convicted of a felony. The government did not cross-examine the witness. The defense rested.

After each party made its final argument, the Court instructed the jury. In giving its instructions on reasonable doubt and credibility, the Trial Judge, in addition to otherwise unobjectionable instructions on the

Footnote 2 (continued)

THE COURT: January '73?

THE WITNESS: Yes, sir.

THE COURT: The first part you say?

THE WITNESS: Yes, sir.

THE COURT: What do you mean by the first part of '73?

THE WITNESS: It could have been the last part of January or the first part of February, along in that time.

THE COURT: Counsel, do you care to inquire?

[DEFENSE COUNSEL]: No, Your Honor, I have no questions.

R. at 67-68.

issue, advised the jurors in an unexceptional way that they were to avail themselves of common sense in the process of deliberation. Neither party objected to these instructions. Tr. 129.

On the substantive offense charged in the indictment, the Trial Judge took the following actions. First, the Court read the statute to the jury. Next, it emphasized that the defendant was being tried for conspiracy, and not for importation. Third, the Court said that there were four elements that the government must prove beyond a reasonable doubt — (i) the conspiracy described in the indictment was formed and in existence during the time alleged; (ii) the defendant knowingly and willfully became a member of that conspiracy; (iii) while the conspiracy was in progress and while the defendant was a member thereof, one of the members knowingly and willfully committed at least one of the overt acts charged in the indictment; (iv) the overt act was committed in furtherance of the illegal object of the alleged conspiracy. Then with painstaking care, the Judge gave instructions elaborating on each element. Again, no objection was made. Tr. 129.

[2] Appellant first argues that the trial court erred in allowing the government to reopen its case-in-chief. As appellant recognizes, however, a trial court has discretion to allow the government to reopen its case when the government's request is predicated upon its inadvertent failure to have adduced or prove some more or less uncontested fact or facet of its case unless the defendant can show prejudice. See, e.g., United States v. Batie, 5 Cir., 1972, 457 F.2d 927; United States v. Wilcox, 5 Cir., 1971, 450 F.2d 1131, 1143-44; Hale v. United States, 5 Cir. 1969, 419 F.2d 147; Dixon v.

United States, 5 Cir., 1964, 333 F.2d 348. Considerable latitude and discretion is vested in the trial court in such matters. See, e.g., Maggard v. Wainwright, 5 Cir., 1970, 432 F.2d 941.

[3] We have carefully examined the record and conclude that the Trial Judge acted within his discretion in allowing the government to reopen its case. The defense had not begun its case when the motion was made. Furthermore, the omission of proof was, without a doubt, inadvertent, and had to do with an uncontested fact — the exact situs of the meeting between Parks and Williams. See Hale, supra, 410 F.2d at 152. Under these circumstances, we find no prejudice and no error.

[4,5] Appellant next argues that the trial court erred in its instructions on such concepts as reasonable doubt, by including in his instructions admonitions that the jury was to use its common sense. Since appellant did not object to the giving of these instructions, we must view this allegation under a plain error standard. E.g., United States v. Brown, 5 Cir., 1977, 547 F.2d 1264, 1266; United States v. McDuffie, 5 Cir., 1976, 542 F.2d 236, 238 n. 3. We find no plain error. The Trial Judge's instructions, considered as a whole, were certainly adequate in all other respects. We do not think that the mere insertion of remarks about the use of common sense as a valuable tool in the deliberative process infects these instructions with plain error. This is especially so since "jurors are not to be presumed ignorant of what everybody else knows. And they are allowed to act upon matters within their general knowledge, without any testimony on those matters." Commonwealth v. Peckham, Mass., 1854, 68 Mass. (2 Gray) 514, 515, cited in United States v. Ricciardi, 2 Cir., 1966,

357 F.2d 91, 95. To supplement otherwise adequate instructions with admonitions to use common sense is merely explicit judicial recognition of the fact that a jury may and will call upon its common experience in affairs of life when evaluating such matters as the veracity of witnesses. Considering that Judges have, or at least are assumed to have, common sense and are to use it in their varied determinations, it would be ironic to hold that an appeal to this quality of intellect, wisdom and experience would be wrong. True they are to be guided by the Judge's instructions but how else are they to receive them apart from some attribute of common sense? We refuse to find that this is plain error.

[6] Finally, appellant argues that the trial court committed plain error in its instructions on the essential elements of the object of the conspiracy. In particular, appellant contends that the trial court erred in failing to instruct the jury that one of the essential elements of the indictment, which the government would have to prove beyond a reasonable doubt, was that the defendant actually intended, by his actions, to further a conspiracy to import marijuana into the United States. That is, the jury should have been charged that unless the government presented proof beyond a reasonable doubt that the defendant had a "specific intent" to send the marijuana to the United States, then he must be acquitted. Since appellant failed to object to the giving of these instructions, we must again review this claim under a plain error standard. See, e.g., United States v. Brown, supra; United States v. McDuffie, supra.

In United States v. Martinez, 5 Cir., 1974, 496 F.2d 664, cert. denied, 419 U.S. 1051, 95 S.Ct. 627, 42 L.Ed.2d 646, a similar claim was raised. There, the in-

dictment charged the appellants with a conspiracy under 21 U.S.C.A. §963 to import marijuana contrary to 21 U.S.C.A. §952(a) and to possess marijuana with intent to distribute contrary to 21 U.S.C.A. §841(a)(1). The trial court in that case gave no instructions which would have apprised the jury of the definition, character, or nature of the acts of importing, possessing, or distributing marijuana. Moreover, the trial court omitted any reference to the substantive crime of possessing with intent to distribute marijuana, one of the objects of the charged conspiracy. Only once during the entire charge did the court attempt to inform the jury of the crime with which appellants were charged, when it instructed: "You, the jury, determine from all the facts and circumstances whether or not a criminal conspiracy existed between these two persons and others to import marijuana from Mexico into the United States." Id. 496 F.2d at 669. This defect, with others, we found to be plain error, necessitating reversal.

This case is distinguishable from Martinez, however. In this case, the jury instructions, read as a whole, adequately charged the jury as to the definition, character, and nature of the acts of importing marijuana into the United States. Furthermore, there were adequate instructions as to the necessity that the jury find beyond a reasonable doubt that appellant had specific intent to commit the crime charged in the indictment. Finally, there is no doubt that there was sufficient evidence from which the jury could have inferred beyond a reasonable doubt that appellant knew the destination of the marijuana. Under these circumstances we find no plain error.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nc. 76-4400
Summary Calendar

D. C. Docket No. 73-202-CR-CF

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOSEPH MARINO,
Defendant-Appellant.

Appeal from the United States
District Court for the
Southern District of Florida

Before BROWN, Chief Judge, and CLARK and HILL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

November 10, 1977

ISSUED AS MANDATE: DEC 20 1977

APPENDIX B

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

December 12, 1977

EDWARD W. WADSWORTH
CLERK

TEL 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA. 70130

TO ALL PARTIES LISTED BELOW:

NO. 76-4400 - U.S.A. -vs- Joseph Marino

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By R. Adeline Barnes
Deputy Clerk

Mr. George D. Gold
Mr. Stephen M. Pave

APPENDIX C

IN THE UNITED STATES

COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 76-4400

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOSEPH MARINO,
Defendant-Appellant.

Appeal from the United States
District Court for the
Southern District of Florida

ORDER:

IT IS ORDERED that appellant's motion to recall and stay the court's judgment previously issued as mandate pending the timely filing and disposition of a petition for writ of certiorari to the United States Supreme Court is GRANTED provided the petition for certiorari is filed on or before February 10, 1978. No further extensions will be granted.

/s/ John R. Brown
UNITED STATES
CHIEF JUDGE

APPENDIX D

SUPREME COURT
OF THE UNITED STATES

No. A-603

JOSEPH MARINO,

Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 10, 1978.

/s/ Lewis F. Powell, Jr.
Associate Justice
of the Supreme
Court of the United States

Dated this 17 day of January, 1978.

APPENDIX E

§952. Importation of controlled substances—Controlled substances in schedules I or II and narcotic drugs in schedules III, IV, or V; exceptions

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that—

§963. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Pub. L. 91-513, Title III, §1013, Oct. 27, 1970, 84 Stat. 1291.